

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT RICCIUTI,

Plaintiff/Counterdefendant-
Appellee,

v

SHELDON L. MILLER,

Defendant/Counterplaintiff-
Appellant,

and

LOPATIN & MILLER, P.C.,

Defendant/Counterplaintiff-
Appellant,

and

SHALINA D. KUMAR,

Defendant.

UNPUBLISHED

May 26, 2005

No. 251859

Wayne Circuit Court

LC No. 02-234265-NM

ROBERT RICCIUTI,

Plaintiff/Counterdefendant-
Appellee,

v

SHELDON L. MILLER,

Defendant/Counterplaintiff-
Appellant,

and

No. 255493

Wayne Circuit Court

LC No. 02-234265-NM

LOPATIN & MILLER, P.C.,

Defendant/Counterplaintiff-
Appellant.

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

In Docket No. 251859, defendants appeal as of right the trial court's judgment granting plaintiff's motion for summary disposition and awarding plaintiff damages of \$89,747.85. We reverse. In Docket No. 255493, defendants appeal by leave the trial court's judgment granting plaintiff's motion for offer of judgment sanctions and awarding plaintiff damages of \$15,886.48. We vacate the order of the trial court.

I. FACTS

This legal malpractice action arose from defendants' representation of Plaintiff Ricciuti in an underlying breach of contract claim against a third party. Plaintiff had a contract with Motor City Harley Davidson Company (MCHD), a Michigan corporation owned by William Hatherill, whereby MCHD agreed to pay plaintiff forty-five percent of the profits in the event that MCHD or its assets were sold. Subsequently, MCHD was sold for \$3 million.

On appeal, plaintiff contends that he only received \$1 million and was entitled to an additional \$350,000 pursuant to the terms of the contract. Plaintiff claims that defendants were negligent in failing to plead damages of \$350,000 in the underlying breach of contract claim and that this alleged legal malpractice resulted in damages to plaintiff. II. DOCKET NO. 251859

A. SUMMARY DISPOSITION

Defendants' first issue on appeal is that the trial court erred in granting summary disposition in favor of plaintiff regarding the legal malpractice cause of action. We agree.

1. Standard of Review

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In evaluating a motion under MCR 2.116(C)(10), a reviewing court must consider the whole record in the light most favorable to the nonmoving party, including affidavits, pleadings, depositions, admissions, and other evidence offered by the parties. *Id.* When the evidence demonstrates that no genuine issue of material fact exists, the movant is entitled to judgment as a matter of law. *Id.*; *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001).

2. Analysis

“The elements of legal malpractice are: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged.” *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004), citing *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). An attorney has a legal duty to use and exercise reasonable skill, care, discretion, and judgment regarding representation of a client. *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2001). Furthermore, an attorney must act as would an attorney of ordinary learning, judgment, or skill placed in the same or similar circumstances. *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995). However, an attorney is not required to guarantee the most favorable possible outcome nor is an attorney required to “exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession.” *Id.* Moreover, “mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence.” *Id.* at 658.

Here, defendants filed a complaint on behalf of plaintiff, alleging that plaintiff was entitled to \$1,350,000 of the proceeds of the sale of MCHD. The complaint further alleged that plaintiff had received payment of \$1,059,635 and was entitled to additional payment of \$290,365. At a hearing on plaintiff’s renewed motion for summary disposition against Hatherill and MCHD, defendant Miller again asserted that plaintiff should have received a total of \$1,350,000 pursuant to the terms of the contract. However, at the hearing on plaintiff’s motion, defendant Miller admitted that the pleading was erroneous and argued that plaintiff was actually owed \$350,000 because he only received \$1 million from the proceeds of the sale of MCHD.

Contrary to plaintiff’s assertion, the amount of damages is not necessarily controlled by the amount specified in the pleadings; rather, it is controlled by the evidence presented to the trial court. Pursuant to MCL 2.601, apart from a default judgment, a trial court “may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings,” as long as the evidence supports the relief granted. See *Allstate Ins Co v Hayes*, 442 Mich 56, 67-68; 499 NW2d 743 (1993); *Michigan Bell Telephone Co v C & C Excavating Co*, 87 Mich App 758, 766-767; 276 NW2d 487 (1979) (concerning former GCR 1963, 518.3). There was conflicting evidence before the trial court in the underlying breach of contract action regarding whether plaintiff had received \$1 million or \$1,059,635 of the sale proceeds, and therefore, whether plaintiff was entitled to an additional \$350,000 or \$290,365 respectively. The trial court possessed the broad discretion to determine the amount of damages based on this conflicting evidence. The trial court determined that plaintiff was entitled to damages of \$290,365. Regardless of the amount of damages pleaded, defendants argued that plaintiff was entitled to \$350,000 in damages and presented evidence to support that position. Therefore, defendants did not breach their legal duty to use and exercise reasonable skill, care, discretion, and judgment regarding their representation of plaintiff. See *Persinger, supra* at 502. Accordingly, we hold that the trial court improperly granted summary disposition in favor of plaintiff and denied summary disposition in favor of defendants.

We further conclude that defendants’ claims relating to the summary disposition judgment are moot. This Court need not address whether the trial court erred by refusing to grant defendants additional time to execute an affidavit opposing plaintiff’s motion for summary

disposition and whether plaintiff's legal malpractice claim should have been barred by plaintiff's failure to appeal the judgment in the underlying breach of contract case.

B. COUNTERCLAIM FOR LEGAL FEES

Defendants' also say that the trial court erred by dismissing their counterclaim for legal fees for failing to seek a specific dollar amount of damages. We agree.

1. Standard of Review

We review a trial court's determination regarding the meaning and scope of pleadings for an abuse of discretion. *Smith v Stolberg*, 231 Mich App 256, 259; 586 NW2d 103 (1998). Moreover, summary disposition is appropriate where the moving party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003). MCR 2.116(C)(8) tests the legal support for a claim based on the pleadings alone. MCR 2.116(G)(5); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 507-508; 667 NW2d 379 (2003). The reviewing court must accept as true all factual allegations supporting the claim and reasonable inferences and conclusions from the facts and consider those facts in the light most favorable to the nonmoving party. *Id.*, p 508. However, conclusory statements that are unsupported by the factual allegations are insufficient to maintain a cause of action. *Churella v Pioneer State Mutual Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). Such a motion should be granted only if the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

2. Analysis

Generally, a complaint must contain a statement of the facts and allegations sufficiently specific to reasonably inform the opposing party of the nature of the claims against him. MCR 2.111(B)(1); *Smith, supra* at 259. The purpose of the requirement to plead with specificity is to avoid both extreme formalism and extreme ambiguity in pleadings. *Id.* Furthermore, MCR 2.111(B)(2) mandates that a countercomplaint contain a demand for judgment. The statute requires, in relevant part: "If the pleader seeks an award of money, a specific amount must be stated if the claim is for a sum certain or a sum that can be stated if the claim is made certain, or if the amount sought is \$25,000 or less." MCR 2.111(B)(2).

The language of defendants' countercomplaint clearly alleged an equitable theory of recovery. Defendants alleged that plaintiff accepted benefits and that plaintiff refused to pay for services rendered on his behalf. While defendants could have been more specific, the allegations were sufficient to reasonably inform plaintiff of the nature of the claim against him. However, defendants failed to plead any amount of damages. Defendants merely requested "judgment in the amount of the attorney fees due and owing." Contrary to defendants' assertion on appeal, the legal fees were computable because a claim for equitable damages may generally be determined by "multiplying the number of hours worked by a reasonable hourly fee." *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 359; 657 NW2d 759 (2002). In their countercomplaint, defendants failed to specify any of the services performed, time spent in performing services or reasonable

hourly rates to be charged. Therefore, the trial court properly observed that defendants failed to satisfy the pleading requirements set forth in MCR 2.111(B)(2).

However, MCR 2.116(I)(5) provides: “If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” Therefore, a trial court must allow a party to amend its pleadings if the pleadings fail to meet the standard under MCR 2.116(C)(8), provided the amendment would not be futile. *Jenks v Brown*, 219 Mich App 415, 421; 557 NW2d 114 (1996). Defendants filed pleadings and a motion for summary disposition on plaintiff’s behalf and represented plaintiff at the hearing on its motion. As a result of defendants’ representation, plaintiff recovered a total of \$415,000 in the underlying breach of contract action. Thus, the lower court record suggests that equity would require defendants to be compensated at some level, and an amended complaint would not be futile. Therefore, we conclude that the trial court erred by dismissing defendants’ counterclaim with prejudice.

III. DOCKET NO. 255493

A. JUDGMENT SANCTIONS

Defendants contend that the trial court erred by granting offer of judgment sanctions to plaintiff and that such sanctions should be vacated if this Court concludes that the trial court erred in granting summary disposition in favor of plaintiff regarding the legal malpractice action. We agree. Generally, this Court reviews a trial court’s determination in awarding offer of judgment sanctions against a party for an abuse of discretion. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 476-477; 624 NW2d 427 (2000). However, because we determined that the trial court’s summary disposition judgment should be reversed, we conclude that the order awarding offer of judgment costs and attorney fees to plaintiff under MCR 2.405 should be vacated.

IV. CONCLUSION

In Docket No. 251859, we reverse the trial court’s summary disposition judgment and remand the case for entry of an order dismissing the legal malpractice claim and allowing defendants to amend their countercomplaint for legal fees. In Docket No. 255493, we vacate the trial court’s order for offer of judgment sanctions against defendants. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette